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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Communications Assistance for  
Law Enforcement Act

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CC Docket No. 97-213  
DA 98-762

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner  
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and Chief Regulatory Officer

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Date: May 15, 1998

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**I. INTRODUCTION**

Pursuant to the April 20, 1998 Public Notice of the Federal Communications Commission ("Commission"),<sup>1/</sup> Nextel Communications, Inc. ("Nextel") and more than 30 other parties, representing nearly every segment of the telecommunications industry, filed Comments supporting an extension of the compliance date of the Communications Assistance to Law Enforcement Act ("CALEA"). Only one commenter, the Federal Bureau of Investigation ("FBI"), opposed extending the October 25, 1998 CALEA deadline.

CALEA established a process whereby the telecommunications industry, in consultation with law enforcement agencies, would establish technical requirements and standards for complying with CALEA.<sup>2/</sup> Recognizing that achieving consensus through the standards-setting process might be time-consuming and/or unsuccessful, Congress authorized the Commission, upon the request of any person or government agency, to establish CALEA requirements and "provide a reasonable time" for the industry to comply with

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<sup>1/</sup> Public Notice, "In the Matter of: Communications Assistance for Law Enforcement Act, CC Docket No. 97-213," DA 98-762, released April 20, 1998.

<sup>2/</sup> CALEA, Section 107 (a)(1).

them.<sup>3/</sup> Additionally, Congress provided that telecommunications carriers may petition the Commission for extensions of time to comply with CALEA's requirements in the event compliance is not "reasonably achievable through the application of technology available within the compliance period."<sup>4/</sup>

On May 8, 1998, more than 30 commenters stated that (a) there is no commercially-available technology or equipment to implement CALEA today; (b) no such technology or equipment will be available, pursuant to **any** standard (the industry's interim standard or otherwise), by October 25, 1998, and (c) complying with CALEA's capability requirements "is not reasonably achievable through the application of technology available within the compliance period."<sup>5/</sup> Pursuant to its authority in Sections 107(b) and (c) of CALEA, as well as its authority under Section 4(i) of the Communications Act of 1934 ("Communications Act"),<sup>6/</sup> the Commission should grant an industry-wide extension of the October 25, 1998 CALEA deadline. This action is in the public interest as it is necessary to ensure the orderly and efficient implementation of CALEA's objectives throughout the telecommunications industry.

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<sup>3/</sup> CALEA, Section 107(b) and (b)(5).

<sup>4/</sup> CALEA, Section 107(c)(2).

<sup>5/</sup> See, e.g., Comments, filed May 8, 1998, of Cellular Telecommunications Industry Association, BellSouth Corporation, Liberty Cellular, Inc. et al., Primeco Personal Communications, L.P., The Telecommunications Industry Association, the United States Telephone Association, Omnipoint Communications, Inc., SBC Communications, Inc., Powertel, Inc., Aliant Communications, Inc.

<sup>6/</sup> 47 U.S.C. Section 154.

All parties, including the FBI, recognize that the October 25, 1998 effective date for CALEA implementation cannot realistically be met.<sup>7/</sup> Attempting to hold carriers to that deadline, as the FBI still urges, would be ineffectual and would not assist law enforcement in fulfilling its duties and obligations, would not promote improved surveillance capabilities on telecommunications networks and would not protect the public welfare. Therefore, it is in the public interest to delay implementation until carriers can reasonably be equipped to comply with the statute's requirements.

## II. DISCUSSION

### A. The Commission Has The Authority To Grant An Industry-Wide Extension

In CALEA, Congress granted the Commission authority to provide carriers "reasonable time" to come into compliance with CALEA's capability requirements, once they are established by the Commission upon request from the industry or the FBI.<sup>8/</sup> Additionally, Congress authorized the Commission to grant extensions of the CALEA implementation deadline where compliance was "not reasonably achievable through the application of

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<sup>7/</sup> Comments of Primeco Personal Communications, L.P. at p. 4, citing *ex parte* presentation of David Yarbrough, FBI, to Magalie Salas, FCC Secretary, CC Docket No. 97-213, at 2 (April 14, 1998) wherein the FBI stated that the CALEA date should be extended. Additionally, the Attorney General of the United States informed Congress that manufacturers will require at least 18 months to develop and build the necessary equipment once a standard is in place. *Id.*, citing Testimony of the Attorney General before the House Appropriations Subcommittee for Commerce, State, Justice, the Judiciary and Related Agencies (Feb. 26, 1998).

<sup>8/</sup> CALEA, Section 107(b).

technology available within the compliance period."9/ Despite the FBI's contentions that the Commission can only grant extensions on a case-by-case basis,10/ neither section prohibits an industry-wide extension of the CALEA compliance deadline. On the contrary, Section 107(b) expressly contemplates an industry-wide extension where, as in this case, "industry or standard-setting organizations fail to issue technical requirements or. . .a Government agency or other person believes that such requirements or standards are deficient."11/

Additionally, Section 4(i) of the Communications Act provides that "[t]he Commission may perform *any and all acts*, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."12/ Section 4(j) further authorizes the Commission to "conduct proceedings in such a manner as will best conduce to the proper dispatch of business to the ends of justice."13/ Pursuant to Section 107 of CALEA, the Commission's function herein is (1) to determine, upon request of the industry or the FBI, the appropriate technical requirements or standards for implementing CALEA and (2) to ensure that carriers are provided "reasonable time" to comply with such standards or requirements.

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9/ CALEA, Section 107(c).

10/ Comments of the FBI at p. 11.

11/ CALEA, Section 107(b).

12/ 47 U.S.C. Section 154(i).

13/ 47 U.S.C. Section 154(j).

In fulfilling these functions, the Commission has discretion to proceed in the manner that it determines will most effectively resolve the issues at hand. Every telecommunications carrier subject to CALEA is experiencing the same technical and equipment availability concerns and would present essentially identical considerations to the Commission if individual extension requests were required. Moreover, the current CALEA deadline is only five months away and the FBI has provided no convincing legal or policy basis for its assertion that industry-wide extensions are impermissible. Under the circumstances, acting on extension requests on a case-by-case basis is unnecessary, and would be inefficient, time-consuming and a waste of the Commission's resources. As the expert agency, the Commission should exercise its discretion in the public interest pursuant to the above-described statutory authority and grant an industry-wide extension of the current CALEA deadline.<sup>14/</sup>

**B. An Industry-Wide Extension Is In the Public Interest**

The record overwhelmingly establishes that no manufacturer -- despite their best efforts over the past four years -- has developed the technology necessary to implement CALEA's capability requirements. As the Telecommunications Industry Association ("TIA") noted in its comments, even the FBI acknowledges that

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<sup>14/</sup> See Federal Communications Commission v. Schreiber et al., 381 U.S. 279 (1965) (The Commission has the "power to resolve 'subordinate questions of procedure. . .[such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions. . .'" ).

industry participants have made "good faith efforts" to develop a CALEA solution.<sup>15/</sup> However, despite the best efforts of all involved, there simply is no technology that can be implemented by any carrier by the October 25, 1998 deadline. As TIA stated, "[i]t is undisputed" that meeting the current deadline is not "reasonably achievable."<sup>16/</sup>

The ongoing legal dispute over the appropriate standard for implementing CALEA's capability requirements has placed telecommunications carriers in a "no-win" situation. Assertions by some interests that the interim standard is, on the one hand "overbroad" and in violation of constitutionally-protected privacy rights, while, on the other hand, other interests assert that it is "underinclusive" and in violation of CALEA's surveillance requirements, have made it impossible for manufacturers to develop CALEA technology and for carriers to provide CALEA specifications to their vendors. Carriers have been "frozen" in place, told from parties on both sides that implementation of the interim standard will result in non-compliance with CALEA. No carrier, and certainly no manufacturer, using rational economic and business judgment, could make the enormous investments necessary to implement the standard under such circumstances.

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<sup>15/</sup> Comments of TIA at p. 13, n. 37, citing the FBI's 1998 Implementation Report. Federal Bureau of Investigation, Communications Assistance for Law Enforcement Act (CALEA) Implementation Report (January 26, 1998).

<sup>16/</sup> See Comments of TIA at p. 2.

The FBI's comments in this proceeding, asserting (for the first time) that interim standard J-STD-025 is, in fact, the "safe harbor" standard specified by CALEA highlights the problems that carriers have faced throughout the standards-setting process.<sup>17/</sup> Prior to now, the FBI has asserted that the interim standard is not sufficient, does not comply with CALEA, and is, therefore -- by definition -- not a "safe harbor." According to the FBI's previous position, a service provider that built to the interim standard could have been subject to fines of \$10,000 per day for non-compliance. Continued confusion regarding the legality of the interim standard, in combination with the significant financial risk to the carriers responsible for implementation, made it impossible for the industry to move forward with the development of CALEA-compliant equipment.<sup>18/</sup>

Granting a two-year extension of the CALEA compliance deadline is in the public interest. Carriers cannot comply using technology that does not exist, fining carriers \$10,000 per day for failure to comply -- despite their best efforts -- does not assist law enforcement in their surveillance activities. In addition, implementing a standard -- any standard -- as soon as possible, simply to change it upon Commission review, is a waste of industry, Commission and law enforcement resources and would not promote the

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<sup>17/</sup> See Comments of the FBI at p. 6.

<sup>18/</sup> Assuming that the interim standard (J-STD-025), adopted by the industry in December 1997, is now accepted by the FBI as the "safe harbor" for purposes of CALEA compliance, see FBI Comments at p. 6, all parties agree that equipment will not be available on October 25, 1998.



public interest. Contrary to the FBI's comments, carriers are not seeking an "indefinite delay,"19/ nor have they made only "bare assertions" that the October 25, 1998 deadline is unachievable.20/ The events that have brought this proceeding to this point are well documented and were anticipated by Congress in authorizing the Commission to grant extension requests. The Commission, therefore, should expeditiously extend the current CALEA compliance deadline.21/

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19/ Comments of FBI at p. 13.

20/ See *Id.* at p. 16.

21/ As Nextel stated in its Comments herein, merely extending the date to October 25, 2000 is arbitrary since there is no assurance when the Commission will have resolved the legal issues regarding CALEA compliance. The record evidences that carriers require at least 24 months to implement any new technical requirement. Thus, to provide "reasonable time" to comply, as required by Section 107(b)(5), the Commission should establish the deadline two years from the date of its final order establishing a CALEA capability standard.

**III. CONCLUSION**

For the reasons discussed herein, the Commission should exercise its authority and extend the current CALEA deadline on an industry-wide basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert S. Foosaner", written over a horizontal line.

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Date: May 15, 1998

## **CERTIFICATE OF SERVICE**

**I, Rochelle L. Pearson, hereby certify that on this 15th day of May 1998, I caused a copy of the attached Reply Comments of Nextel Communications, Inc. to be served by hand delivery to the following:**

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**Rochelle L. Pearson**